United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By
ROBERT POLSTEIN

76-1584

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

No. 76 - 1584

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CLARA NEMES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT CLARA NEMES

ORANS, ELSEN & POLSTEIN
Attorneys for Defendant-Appellant
CLARA NEMES
One Rockefeller Plaza
New York, New York 10020
(212) JU 6-2211

ROBERT POLSTEIN
GARY P. NAFTALIS
HAROLD B. TEVELOWITZ
Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1584

UNITED STATES OF AMERICA,

Appellee,

against

CLARA NEMES,

Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR APPELLANT NEMES

QUESTIONS PRESENTED

1. Does the government's failure to prove that its evidence was derived from wholly legitimate sources, independently from appellant's immunized testimony before a state grand jury investigating the same acts for which she was indicted in this Court, require reversal and remand for an evidentiary hearing?

2. Did the admission of evidence as to a separate offense not charged in the indictment, which was proved by improper hearsay evidence, constitute prejudicial error?

3. Was the government's evidence legally insufficient to establish that appellant specifically intended to defraud the United States by filing false cost reports?

4. Did the Trial Court err in failing to charge the jury that specific intent was required for appellant to be a member of the conspiracy charged?

5. Did the unfairly inflammatory nature of the prosecution's summation, based on facts not in evidence and containing unfounded insinuations, amount to prejudicial error?

PRELIMINARY STATEMENT

Clara Nemes appeals from a judgment of conviction entered on October 15, 1976, in the United States District Court for the Southern District of New York, after a two week trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment No. 76 Cr. 534, a fourteen count indictment filed on June 8, 1976, named appellant Nemes, Manlio S. Severino ("Severino") and his son, Dr. Lawrence J. Severino ("Lawrence") as defendants. Count One charged all defendants with violating Title 18, United States Code §371, and alleged that they had conspired together to defraud the United States by filing false Medicare and Medicaid forms on behalf of a nursing home owned and operated by the Severinos. Appellant was named only in Count One.

Lawrence was charged in Counts Twelve and Thirteen with substantive crimes in furtherance of the conspiracy. Upon motion prior to trial both counts were severed. These charges against Lawrence were eventually dismissed by the government when his father pleaded guilty.

Severino was charged in the remaining eleven counts with having committed various substantive crimes in furtherance of the conspiracy.

Nemes and Severino proceeded to trial before Judge Wyatt and a jury on September 28, 1976. On October 13, 1976, Severino suffered a stroke and his case was severed. The trial continued against appellant alone on the single conspiracy count.

On October 16, 1976,the jury returned a verdict of guilty against appellant.

On November 29, 1976, Judge Wyatt sentenced appellant to two years imprisonment, two months of said sentence to be served in a jail-type institution, with execution of the remainder of the prison sentence suspended.

Appellant is presently free on bail pending appeal.

On December 3, 1976, Severino pleaded guilty, and was subsequently sentenced to five months imprisonment and a $2,500 fine.

STATEMENT OF FACTS

Background

In the fall of 1969, Manlio S. Severino organized Sprain Brook Manor Nursing Home ("Sprain Brook") in Scarsdale, New York. The owners of record were his wife (Annette; an unindicted co-conspirator),daughter (Joan Severino Parisi; an unindicted co-conspirator) and son (Lawrence; a co-defendant whose trial was severed) (R. 765).* Severino, using his wife and children as nominees, also operated at least four other enterprises,

*References to the trial transcript are preceded by "R"; references to appellant's Appendix are preceded by "A."

including the Kent Nursing Home at Holmes, New York (R. 763-765, 951). The accountant for all of these ventures was one Percy Karlin, another unindicted co-conspirator (R. 764-765).

Under the Medicaid and Medicare programs the upkeep for many of the patients at Sprain Brook was paid by the New York State Department of Health and the United States Government (which, under the Medicaid program, reimbursed the state). During the nursing home's initial phase these governmental agences estimated budgetary needs based on expenses of similar facilities in the vicinity. Commencing in 1971, however, the amount of public funds to be distributed to Sprain Brook was dependent on certain official forms ("SSA 1750" in the case of the federal program and "HE2-P" for the state) on which it was required to detail accurately the actual cost and expenses of running the home. The Travelers Insurance Company ("Travelers"), pursuant to contract with HEW, acted as the fiscal intermediary between Sprain Brook and the federal government in the distribution of funds pursuant to claims submitted under the Medicare program.

The single count upon which appellant was convicted alleges that she, Severino, Karlin and others conspired to defraud the government by submitting false SSA 1750 forms for 1971, 1972 and 1973 to Travelers, and false HE2-P forms for 1971 and 1972 to New York State (for purposes of simplicity, both sets of forms will be referred to herein as "cost reports").

The Government's Case

A. Evidence relating to the conspiracy to file fraudulent cost reports.

Viewed in the light most favorable to the government the proof showed that even before Sprain Brook opened, Severino and Karlin began the scheme that eventually led to this indictment. Thus, in 1969, in order to obtain a variance for ten extra beds, Severino entered into a fictional lease of an additional acre of land at an annual "rental" of $8,000 (R.542), and Karlin listed this "rental" as a nursing home expense on cost reports (R.787-790). Similarly, Severino and Karlin inflated expenses on the 1971 cost reports by approximately $30,000 by improperly listing 1970 mortgage interest payments as "cost of construction" chargeable to the expenses of running the home (R.781-785).

In the Spring of 1971, long after these acts had occurred, appellant was interviewed by Karlin and Severino for a bookkeeping position (R.264). Appellant, a political refugee from Hungary, was not hired initially because Severino questioned her ability to speak English adequately (R.1028). She was subsequently employed as a bookkeeper and worked directly under Karlin's supervision (R.1030-1031).

The government's proof at trial, presented mainly through the unindicted co-conspirator, Karlin, conclusively established that appellant in no way participated in preparation of the fraudulent cost reports that were the basis of the indictment. The

five cost reports upon which the indictment was predicated were each signed and certified by either Severino or Karlin (R.138, 142, 297, 299). Karlin testified that only he and Severino prepared those cost reports (R.778). According to Karlin, appellant was not even present when they were prepared (R.1059-1060), and she did not participate in any way in drafting them (R.1320-1321). He swore that appellant never made any adjustments to the cost reports and he never advised her of any adjustments that he had made (R.1054, 1059-1060). Karlin further conceded that he had never discussed the cost reports with appellant (R.1054).

Further, according to Karlin, appellant did not even prepare some of the back-up materials, such as depreciation schedules, upon which the cost reports were based (R.1317). He further admitted that it was he who directed appellant how to post certain disputed items in the books (R.1031, 1076) and when he subsequently adjusted those bookkeeping entries he did not even advise her of the closing adjustments he had made (R.1054, 1318-1319).

The prosecution's proof also demonstrated that appellant had no dealings with the governmental agencies involved, which dealt solely with Karlin and Severino. According to Swan, the auditor from Travelers, appellant was merely a bookkeeper working under Severino's supervision (R.294-295). She did not attend any hearings between Sprain Brook and Travelers concerning disputed cost items (R.242). Travelers never relied on any representations made by her

(R.302) and her name did not even appear in Travelers' files (R.303). Similarly, an analyst from the New York State Department of Health also testified that appellant's name nowhere appeared in the state's file (R.391-392).

Rosemary Weiss, the former administrator of Sprain Brook, testified that appellant was merely the head bookkeeper, had nothing to do with making policy or running the home, never acted for Severino in his absence, and had no authority to sign Sprain Brook checks (R.670-671, 681-682). Other former Sprain Brook employees similarly testified that appellant had no authority to sign checks (R.692), that it was Karlin alone who directed appellant how cost items were to be allocated (R.737-738), that if Nemes "misposted" any items Karlin would order her to correct them (R.743-744), and that if appellant had any questions "about how particular items were to be carried on the books" she would ask Karlin "and his word was final" (R.1373).

The indictment alleged a conspiracy to fraudulently inflate expenses on the cost reports by some $276,000. Trial evidence, viewed most favorably for the government, warranted the jury in finding that Severino and Karlin falsified cost reports in the following respects: payment of salaries to Severino's wife, son and daughter for services they did not perform (R.456-462); payments to Lawrence for services as medical director that were never performed (R.1382-1407; purchase of an electric garage door for Lawrence's private home (R.499-506); purchase of floor covering for Severino's home in Westchester (R.506-511); purchase

of approximately $7,000 worth of furniture for Severino's Florida condominium (R.511-527); failure to disclose the lack of an arms-length relationship between Sprain Brook and a related cleaning company controlled by Karlin and Severino (R.906-911). Although in no way connected to appellant, evidence was admitted that Severino pocketed small change from the Coca Cola machines at the nursing home in order to start a college fund for his grandchildren (R.831-832) and Karlin included his own daughter's Blue Cross premiums in the Sprain Brook's cost reports (R.1052-1053).

Only a minimal portion of the proof relating to the $276,000 fraud was connected in any way to appellant. The prosecutor, in his summation, flatly conceded that "a good part of this case" and "a good part of the evidence" applied solely to Severino and had not been connected to appellant (A.31,44-45; R.1547, 1561-1562). The three items most closely connected to appellant--purchases of Severino's floor covering and furniture and his son's electric garage door--involved only $7,700 of the alleged $276,000 fraud (R.503, 509, 820). Even with respect to those three items, proof was scanty, and established only that Nemes recorded these items in the books under inappropriate listings (R.809, 815, 820-822), and prepared some of the checks and checkstubs (R.811, 813). She did not sign any checks relating to those items and there was no direct evidence that her acts were other than those consistent with the normal duties of a bookkeeper.

B. The evidence relating to Limpio.

The indictment alleged that part of the conspiracy involved the failure "to disclose the lack of an arms-length relationship between Sprain Brook and Limpio Services, Inc., a sham corporation which was formed to show an increase in the costs of Sprain Brook." The prosecutor stated in his opening that proof would establish that appellant "controlled" and "really ran" Limpio (R.45), and urged in his summation that the government had proved that Nemes "utterly controlled" Limpio. Both statements were totally inconsistent with and unsupported by the evidence.

Appellant was neither a director, officer nor employee of Limpio. Severino's son, daughter, and three grandchildren were listed as owners of the cleaning company, together with Olga Vera ("Olga") who had been forelady of the cleaning crew at Sprain Brook (R.33). Olga--another unindicted co-conspirator--was given a 10% share of the company to act as its "president" (R.889) and Severino arranged for Limpio to lease a car for her (R.1285). According to Karlin, Olga and Severino ran the day-by-day operations of Limpio (R.1284-1285).

Karlin was the secretary of Limpio, acted as its accountant, and signed corporate checks (R.883, 889, 890). Karlin's home was listed as Limpio's mailing address (R.885). Karlin prepared Limpio's corporate tax returns, which were signed and filed by Severino (R.1307-1308). According to Karlin, Severino was the only person with whom he conferred concerning Limpio's

financial problems (R.1286).

All that the government's evidence established was that appellant performed normal bookkeeping services for Limpio. Karlin testified that although Nemes kept the books, the only thing he would ever check with her was the bank balance (R.1286). Karlin could not remember appellant ever signing any Limpio checks (R.1335) and although various checks drawn on the Limpio account were introduced in evidence, a few of which had been prepared by appellant in her capacity as bookkeeper, none had either been signed or endorsed by her (R.750-753, 756, 760).

Swan, Travelers' auditor, testified that he knew of no connection between appellant and Limpio (R.495). The nursing home's former administrator, as well as a former payroll clerk, both testified that Nemes had at no time ever signed Limpio checks (R.681-682, 756, 760). Indeed, appellant had so little awareness of the Limpio structure that she misspelled the name as "L-Y-M-P-I-O" on the document used to open the bank account (R.1569).

Limpio's employees were paid in cash (R.901). Either appellant or another bookkeeper (Rosemary McNamara) would prepare a weekly check for Limpio's payroll, which either Karlin or Olga would sign (R.660-661, 712, 1368). Each week there was at least $200 cash remaining after Limpio payroll envelopes had been stuffed (R.714-715). Former employees testified that they were not sure whether this cash was given to Nemes or Severino, and

did not know what happened to it (R.660-661, 714-715, 1368-1369, 1380-1381). The only proof submitted by the government as to the eventual disposition of this excess cash drawn from Limpio was K rlin's testimony that Severino admitted that he had been taking i to pay for his grandchildren's college education (R.903, 906).

Early in 1973, Severino asked Karlin how he could conceal the cash he had been taking from Limpio, and Karlin advised him to put fictitious employees on Limpio's payroll by "taking social security numbers out of the air" (R.906,907). Three separate payroll books were set up -- one was kept at Sprain Brook, one was kept at Kent (Severino's other nursing home) and the fictitious one was kept in Severino's desk (R.908). There was no evidence tying Nemes to the fraudulent payroll book. Karlin prepared quarterly returns concerning these fictitious employees and filed them with the IRS (R.911). There was no evidence that these returns were ever shown to appellant (R.913). These false returns were neither connected to the allegedly false cost reports nor to appellant.

In short, the government never proved that appellant "controlled" Limpio, and the prosecution's summation in this regard was not based on the record.*

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*In this respect the prosecution's closing statement was sufficiently prejudicial to require reversal. See: Point V, infra.

C. The evidence relating to Tarpetto.

On November 1, 1973, new owners took over Sprain Brook from Severino, and assumed the Limpio contract. In the spring of 1974 -- many months after the transactions upon which the cost reports were based had taken place -- Severino became concerned over the new owners' payments to Limpio, and asked Karlin how he could reduce the cleaning company's profits (R.926-927). Karlin told him that one way to evade paying taxes on Limpio's profits was by increasing its expenses (R.927). Several weeks later, according to Karlin, Severino told him that Tarpetto Cleaning Service ("Tarpetto") was an independent cleaning contractor that could perform outside services for Limpio (R.928).

Evidence concerning Tarpetto -- a company that had neither been mentioned in the indictment or bill of particulars nor referred to in the government's opening statement -- was admitted over appellant's timely and continuing objection "to any matters, any evidence pertaining to the Tarpetto situation" (R.935).

There was no evidence demonstrating that the Tarpetto episode, which commenced in July of 1974, affected the cost reports that had been filed for 1971, 1972 and 1973. Although money was transferred from Limpio to Tarpetto, according to the government's main witness, Karlin, these transactions had absolutely no effect on the amount of Medicare or Medicaid reimbursement (R.1099). Concededly, appellant was involved with Tarpetto, but such

involvement in no way was connected to the alleged conspiracy to falsify cost reports, nor was it at all relevant to the charge for which she was being tried.

On July 16, 1974, appellant filed a corporate resolution, previously signed by Severino, authorizing a checking account for Tarpetto (R.1410-1411). Between July and December of 1974, Limpio paid a number of checks to Tarpetto, some for "outside services" and others for "loans" (R.936-938). A number of the checks were in Severino's handwriting and some were in appellant's, but all were signed "Olga Vera" (R.937). A superceding resolution and signature card, designating Olga Vera as president and Clara Nemes as secretary of Tarpetto, was subsequently presented to the bank in August of 1975 (R.1412-1413). Tarpetto funds were used to pay appellant's personal expenses (R.1495-1496).

According to Karlin, in the summer of 1975 (after the state nursing home investigation had commenced) appellant told him that the payments from Limpio to Tarpetto were loans, which she was going to repay as soon as she sold some jewelry that she had smuggled out of Hungary (R.939). Karlin conceded, that for purposes of Medicare or Medicaid reimbursement, it did not matter whether the payments to Tarpetto were listed on Limpio's books as loans or drawings (R.1099).

Over objection, Olga's daughter, Haydee Nobregas, was permitted to describe her mother's purported testimony concerning

Tarpetto during two appearances before a state grand jury investigating alleged nursing home abuses (R.1459-1460). Of course, this evidence was the rankest kind of hearsay.* According to this witness, (who obviously had not been present when her mother testified in the grand jury), Olga had changed her testimony because she had been "brainwashed" by Clara Nemes concerning the Limpio-Tarpetto loans (R.1461-1462). Although Olga herself was in the courthouse the prosecutor did not call her as a witness because he doubted her credibility (R.1475).

All of this "Tarpetto evidence" concerned events in 1974, 1975 and 1976, and was in no way relevant to the charge that appellant conspired with others to make false statements to a federal agency in 1971, 1972 and 1973. The hearsay evidence about Olga's grand jury testimony had nothing at all to do with the cost reports that were the basis for the conspiracy charge.

Defendant's Case

Nemes rested without calling any witnesses and without testifying in her own defense. A series of checks from Nemes to Tarpetto, deposit slips to Tarpetto's account, and a withdrawal from Nemes' personal bank account, all between July, 1975 and February, 1976, were introduced in evidence on appellant's behalf.

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*The highly irrelevant and totally prejudicial aspect of this testimony is discussed more fully in Point II, infra.

The Sentence

Appellant, a 49 year old political refugee from Hungary, has no prior criminal record. The Court, in imposing sentence, recognized this and added that the pre-sentence report indicated that she was an industrious worker. Judge Wyatt characterized appellant as "a paid employee, a bookkeeper" and stated "I have no doubt that Manlio Severino is the most culpable and that as between him and Mrs. Nemes, he was the dominant figure " (transcript of Sentencing, pp.8-10). Nevertheless, appellant was sentenced to two months imprisonment. Appellant is gainfully employed and is free on bail pending appeal.

Severino pleaded guilty to a substantive count. He had previously been convicted of grand larceny in the state court. Judge Wyatt sentenced him to five months imprisonment and a $2,500 fine (transcript of Severino's Sentencing, p.10).

POINT I

THE GOVERMENT FAILED TO PROVE THAT ITS EVIDENCE WAS DERIVED FROM WHOLLY LEGITIMATE SOURCES INDEPENDENT FROM APPELLANT'S IMMUNIZED TESTIMONY BEFORE A STATE GRAND JURY INVESTIGATING THE SAME ACTS FOR WHICH SHE WAS INDICTED IN THIS COURT.

It is fundamental that a conviction based upon a defendant's immunized grand jury testimony, or any evidence derived therefrom, cannot stand. Thus, where a defendant has received immunity, the government bears the burden of proving that its evidence is derived from independent sources.

In the instant case, appellant had testified under immunity before a state grand jury investigating the very same transactions that are the subject of this indictment. Yet at no time did the government demonstrate that its evidence at trial was not derived from this tainted source. Indeed, no evidentiary hearing was even held for that purpose. That failure constitutes reversible error.

The indictment in this case was filed on June 8, 1976. Months earlier, on January 30 and February 27, 1976, appellant testified before a state grand jury empaneled by Charles J. Hynes, the special State Prosecutor on nursing homes. That grand jury was also investigating possible violations of the laws relating to Medicaid reimbursement by Manlio Severino and Sprain Brook Manor Nursing Home. Pursuant to New York

CPL §190.40, appellant was granted transactional immunity by virtue of her grand jury testimony about these subjects. Thus she could not be prosecuted in New York State for any of these transactions.

On the federal level, this immunity protected appellant against the use of her testimony and against the use of any evidence obtained as a result of her testimony. This was stated by the Supreme Court in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 78n. 18 (1964):

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

The affirmative burden on the government to show that its evidence was not derived from a tainted source was stated again by the Court in Kastigar v. United States, 406 U.S. 441, 460(1972):

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

See:also United States v. Catalano, 491 F.2d 268 (2d Cir.) cert. denied, 419 U.S. 825 (1974).

The quantum of proof necessary to establish freedom from taint is not a light one. Here, the government was required to demonstrate by a "preponderance of the evidence" that its proof was obtained through independent legitimate sources rather than appellant's immunized grand jury testimony. See: United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); United States v. Schipiani, 414 F.2d 1262 (2d Cir. 1969); United States v. Cole, 463 F.2d 163 (2d Cir. 1972).

In the instant case, the government never met, nor even tried to meet, this burden. Appellant's trial counsel moved for dismissal of the indictment because of the immunity grant and also joined in co-defendant Severino's request for a hearing on the immunity issue. The government made not the slightest attempt to demonstrate that its evidence was "derived from a legitimate source wholly independent of the compelled testimony." Instead, the prosecutor blandly stated "we have not seen or used her testimony before the state grand jury or to any state investigator." (Affidavit of Assistant United States Attorney George Wilson, filed August 12, 1976; A.28). Apparently relying on this terse representation, the District Judge summarily denied appellant's motion without even holding a hearing. (Opinion of Hon. Inzer B. Wyatt, dated September 7, 1976; A.29).

This was error. The government's affirmative burden of showing that its evidence is wholly derived from independent

untainted sources is plainly not satisfied by a simple one-sentence denial. Rather, an evidentiary hearing must be held. See, e.g., United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976) United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975); United States v. Bianco, 534 F.2d 501 (2d Cir. 1976).

The mere fact that the prosecutor did not read the immunized testimony does not mean that evidence derived from it was not used. For example, appellant's testimony about the transactions which are the subject of this indictment in all probability led to the discovery of other witnesses and evidence. And this other evidence was furnished to the federal authorities by the special state prosecutor. (Indeed, the prosecutor obviously was familiar with the testimony of other co-conspirators before the state grand jury; see page 39, infra). It is only through an evidentiary hearing, where the prosecution must demonstrate the source of each of its items of evidence, that the presence or absence of taint may be detected.

Since that demonstration was not made here, appellant's conviction cannot stand.

POINT II

ADMISSION OF THE TARPETTO EVIDENCE WAS ERROR BECAUSE (1) IT PROVED AN INDEPENDENT CONSPIRACY, (2) ITS MINIMAL PROBATIVE VALUE WAS FAR OUTWEIGHED BY ITS DEVASTATING PREJUDICIAL EFFECT, (3) IT WAS PROVED THROUGH POST-CONSPIRACY HEARSAY DECLARATIONS THAT WERE NOT ADMISSIBLE AGAINST APPELLANT AND (4) THE PREJUDICE WAS COMPOUNDED BY ADMISSION OF HEARSAY EVIDENCE OF AN ALLEGED COVER-UP OF THIS INDEPENDENT OCCURRENCE.

Appellant was charged with being part of a conspiracy to defraud the government through the submission of false cost reports for Sprain Brook for the years 1971, 1972 and 1973. As noted in Point III, infra, the evidence of Mrs. Nemes' guilt of this charge was quite thin. The prosecution, however, sought to bolster its case by offering evidence relating to a different offense -- Tarpetto Cleaners -- and for a later and different period of time -- 1974-1976. This proof tended to show a subsequent conspiracy by Severino and Karlin to evade taxes. And viewed most favorably to the government, it also showed that appellant improperly used Tarpetto's funds to pay her personal expenses. This proof quite simply should not have been received since its dubious relevance was strongly outweighed by its prejudicial character. Moreover, the means by which the Tarpetto transactions were proved involved the use of inadmissible prejudicial hearsay. Hence a reversal is required.

The questionable relevance of the Tarpetto evidence was apparent from the first. Initially, the Court questioned its relevance, pointing out that there was nothing in the indictment or bill of particulars about Tarpetto, and that "there is no charge that that was the object of the conspiracy, to enable Severino to bleed money and put it in his own pocket" (R.929, 932, 933). The Court stated bluntly, "Mr. Wilson, I don't see any charge in the indictment to which this could relate and I am rather surprised that you are embarking on this" (R.930). The government argued that the Tarpetto evidence "goes to the proof of both the conspiracy and substantive counts" (R.930) and that as far as appellant was concerned it "shows her part in the conspiracy and her guilty knowledge" (R.934). The government further urged that the Tarpetto evidence would show "what he [Severino] was doing, he was taking money out of Limpio and putting it in his own pocket" (R.935). The Court finally decided, "Well, it is close enough so that I think I must allow it" (R.935). Nemes' lawyer noted a continuing objection "to any matters, any evidence pertaining to the Tarpetto situation" (R.935).

It is uncontroverted that the Tarpetto transactions had no effect upon the expenditure of Medicare and Medicaid funds -- which was the subject of this charge (R.1099). Indeed, the government conceded at trial that "the Tarpetto bank account is not offered to show that the money that went to Tarpetto was unjustly claimed as an expense on the 1971, '72 or '73 cost reports" (A.62; R.1579).

The relevance of the Tarpetto evidence was slight insofar as appellant was concerned. Appellant's involvement with Tarpetto is thrice removed from the conspiracy alleged in the indictment. In 1975 and 1976, appellant repaid Tarpetto for money it had advanced for her personal use. Tarpetto then repaid Limpio for monies Limpio had advanced to it pursuant to Severino's scheme to evade taxes. It is questionable indeed to claim that such proof is relevant to show appellant's "guilty knowledge" of a conspiracy to defraud the government in connection with Medicare reimbursements in 1971-1973. In this respect it cannot be repeated too often that it was Sprain Brook (i.e., Karlin and Severino) that filed the fraudulent cost reports which failed to disclose the lack of an arms-length relationship between Sprain Brook and Limpio. The Limpio-Tarpetto transactions took place long after Severino had sold the nursing home. And the Nemes-Tarpetto transactions took place even later -- long after the last cost report had been filed.

It is well-settled that not every anti-social act is relevant on the question of guilty knowledge of the crime charged. Thus, in Bullard v. United States, 395 F.2d 658, 660 (5th Cir. 1968), the conviction against defendant for violating the Dyer Act was reversed because the evidence adduced to prove criminal intent was irrelevant:

> "However, as pointed out by this court in Helton v. United States (5th Cir.) 221 F.2d 338, the prior act of a damaging nature must truly illustrate something concerning the

> very issue before the trial court. Here, regardless of how anti-social this appellant was shown to be by testimony that she was willing to defraud an insurance company by staging a burning or theft of another automobile, this does not illustrate the issue of whether Miss Bullard knew or did not know that the two entirely different automobiles for whose illegal possession she was on trial had been stolen before being brought into the state of Alabama.
>
> Naturally, a jury might well decide that a person about whom it was said that she was willing to participate in a fraud against an insurance company dealing with an automobile might be such a person as would, with guilty knowledge, take possession of the automobiles here in issue. This does not meet the test because the evidence did show only a propensity on the part of Miss Bullard to commit a fraud or possibly a crime and not that she actually knew that these particular automobiles had been stolen.
>
> There is no doubt but that this testimony was extremely prejudicial. It was objected to by counsel for the appellant who thus preserved the matter for our review." (Emphasis in original).

See also: South v. United States, 368 F.2d 202 (5th Cir. 1966); United States v. Accardo, 298 F.2d 133 (6th Cir. 1962).

Moreover, even assuming arguendo that the Tarpetto evidence was marginally relevant, its probative value was far outweighed by its prejudicial nature. Rule 403, Federal Rules of Evidence. See: United States v. Robinson, 544 F.2d 611, 615-620 (2d Cir. 1976). And the record demonstrates that the Tarpetto

evidence was devastating indeed. It established that appellant was not above converting to her own use monies that were not hers. From that fact, the prosecutor repeatedly argued to the jury that Nemes was involved in a money-laundering operation. Appellant was not on trial for "laundering money" of Tarpetto or converting Tarpetto's money to her own use. Yet that evidence and the prosecutor's inflammatory use of it (A.34, 53, 62; R.1550, 1571, 1579), enabled the jury to conclude that because of her general moral obliquity, it could be inferred that she committed the crime for which she was on trial. United States v. Torres, 503 F.2d 1120, 1125 (2d Cir. 1974). See also: United States v. DeCicco, 435 F.2d 478, 484 (2d Cir. 1970); United States v. Falley, 489 F.2d 33 (2d Cir. 1973).

Furthermore, the method by which the Tarpetto transactions was proved was also improper. The Tarpetto evidence was elicited from the witness Karlin, who testified to hearsay statements made by Severino in 1974 and 1975, after the sale of Sprain Brook and after the cost reports (which are the subject of the indictment) had been filed. Hence, these conversations with Severino were not during or in furtherance of the conspiracy charged in the indictment. They thus were hearsay and should not have been received. Rule 801, Federal Rules of Evidence. As the Supreme Court said in Dutton v. Evans, 400 U.S. 74, 81 (1970):

> "It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted

> against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during the subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise" (Emphasis added).

The leading cases of Grunewald v. United States, 353 U.S. 391 (1957) and Krulewitch v. United States, 336 U.S. 440 (1949) made clear that such post-conspiratorial statements may not be received. In those cases (as in the instant case), the central aim of the conspiracy had either never existed or had long since ended in success or failure when the statement in question was made. A declaration made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment is not admissible against a co-conspirator. In short, Karlin's testimony as to Severino's statements concerning Tarpetto was nothing more than hearsay evidence of post-conspiracy wrongdoing that was not charged in the indictment. Its receipt in evidence was error.

The government's "mini-trial" of Tarpetto involved additional error. Not content with simply proving separate Tarpetto transactions, the prosecutor then introduced evidence as to an alleged cover-up of that independent crime. The evidence was as follows: In the early winter of 1976, Olga Vera appeared before a state grand jury that was investigating Sprain Brook (R.1473). Haydee Nobregas, Olga's daughter, was called to testify about her mother's grand jury testimony, and stated that

Olga initially had not been able to remember the Tarpetto transaction when she was questioned in the grand jury but, after her memory was refreshed by Clara Nemes, she returned to the grand jury and changed her testimony (R.1459-1460).

Nobregas' evidence about her mother's grand jury testimony was, of course, hearsay. Rule 801(c), Federal Rules of Evidence. Even if Olga, herself, had testified as to her statements in the grand jury in 1976, this would not have been during or in furtherance of the conspiracy charged -- where the last claim for reimbursement was submitted by Sprain Brook in April of 1974, almost two years earlier. See: Krulewitch v. United States, supra; Grunewald v. United States, supra. Indeed this Court has recognized that post-conspiracy testimony before a grand jury or administrative agency by a co-conspirator is inadmissible hearsay. United States v. Kelly, 349 F.2d 720, 758 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

Certainly, if Olga could not have testified concerning her grand jury testimony, the admission of her daughter's hearsay evidence concerning such testimony was doubly improper. Moreover, the government's disregard of the hearsay rule is further demonstrated by its explanation to the Court that it was not calling Olga Vera as a witness, even though she was available,* because "we cannot vouch for her credibility" (R.1475).

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*Because Olga was an available witness, the contents of her former grand jury testimony is also excluded by the hearsay rule. Rule 804 (b)(1), Federal Rules of Evidence.

The prejudicial effect of this improperly received testimony was exacerbated when, during the government's summation, the hearsay was repeated to the jury, and in fact embellished (see page , infra).

In sum, the effect of the admission of these items of hearsay evidence constitutes prejudicial error. Cf. United States v. Pacelli, 491 F.2d 1108 (2d Cir.), cert. denied, 419 U.S. 826 (1974); United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), cert. denied, 409 U.S. 1127 (1973); Cannady v. United States, 351 F.2d 796 (D.C. Cir. 1965).

We submit that each of the items detailed above concerning Tarpetto was erroneously received in evidence against appellant.* The cumulative effect of each of these errors, piled one on the other, is so devastating as to mandate a new trial.

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*This was not the only occasion when the government sought to introduce palpably improper evidence of alleged subsequent cover-ups which were in no way related to appellant. Thus, the prosecutor was permitted to prove that Severino had supplied a lawyer for Olga Vera (R.1296). Similarly, after calling Rosemary Weiss, the former nursing home administrator, as a government witness, the prosecutor was permitted to impeach his own witness and attempt to prove that she had received a $25,000 payoff from Severino (R.665-669). Neither of these events was connected with appellant.

POINT III

BECAUSE OF THE PROSECUTION'S FAILURE TO PROVE APPELLANT'S SPECIFIC INTENT TO JOIN THE CONSPIRACY TO FILE FALSE CLAIMS THE PROOF AGAINST HER WAS LEGALLY INSUFFICIENT.

The single count on which Nemes was convicted alleged that she was part of a conspiracy to defraud the government by filing false claims for reimbursement under the Medicaid and Medicare laws. Although the government established the existence of the conspiracy charged, the proof was insufficient to establish that appellant was a knowing participant.

Taking the government's proof at its best there was simply no evidence that connected Nemes to the conspiracy to defraud the government by filing false cost reports. Nemes did not participate in the filing of the cost reports; she did not have any obligation or duty to do so; she was not present when they were prepared; neither Severino, Karlin, nor any official from the state or federal agencies involved discussed the reports with her; she neither signed nor certified them; and there was no proof that she had any knowledge of what was contained in the reports that had been filed (R.302-303, 391-392, 778, 1054, 1318-1319).

In United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944), Judge Hand held:

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them."

Apposite to the instant case is Ingram v. United States, 360 U.S. 672 (1959). There, the Supreme Court reversed the convictions of defendants who had been found guilty of conspiring to evade and defeat the payment of federal taxes imposed on lottery operations. Like appellant, those defendants were relatively minor clerical functionaries. Although it had been proved that they were participants in a conspiracy to conceal the operation of the lottery from local law, the court held that the jury's verdict that they were parties to a conspiracy with a purpose illegal under federal law was not warranted. There was no

independent proof that they knew of the tax liability. The Supreme Court found that evidence that they might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them, was not evidence that they actually did know of them. The Court reaffirmed the holding of Direct Sales Co.v. United States, 319 U.S. 703, 711 (1933):

> "Without the knowledge, the intent cannot exist . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes."

Similarly, in United States v. San Juan, 545 F.2d 314, 318 (2d Cir. 1976), a conviction for willfully transporting currency into the United States without filing a report thereof was reversed and dismissed by this Court, which noted:

> "Without proof of any knowledge of, or notice to, Mrs. San Juan of the reporting requirements, a jury could not determine beyond a reasonable doubt that she had the requisite intent."

In United States v. Kates, 508 F.2d 308 (2d Cir. 1975), the conviction of a lawyer for conspiring to defraud the Department of Housing and Urban Development by participating in

a scheme to rig estimates and inflate billings in order to destroy competitive bidding on moving contracts was reversed because the evidence failed to establish that he had knowingly entered into the conspiracy or that he had a specific intent to defraud the government. There was no doubt that the prosecution had established that the defendant had been involved in kickback activities on his own, that he had demanded and received cash payments from participants in the underlying conspiracy in order to evade taxes and that he was fully aware of the purpose of the underlying conspiracy to defraud HUD. In reversing the conviction, the Court found (at p. 312):

> "Rather than being in furtherance of that conspiracy, his activities, as depicted by the evidence, are at least independent of it and perhaps even an obstruction to it. Similarly, the fact that Kates insisted that the movers pay him in cash, while accepting payments by check from his clients, does not tend to show that he was involved in this particular conspiracy to defraud the Government. That Kates may have wanted to conceal his transactions may tend to show that he was involved in an activity of dubious propriety, but not necessarily that he has part of the conspiracy charged."
>
> * * *
>
> "As we stated earlier, however, mere 'knowledge of shadowy dealings' is insufficient to infer that a defendant was part of the conspiracy. Peipgrass, supra, 425 F.2d at 199.

> While such knowledge may have some probative value by giving meaning to seemingly innocuous acts by the defendant, the evidence introduced at trial pertaining to Kates' knowledge of the workings of the conspiracy was too sketchy to warrant an inference by the jury that he shared its purpose and was a part of it. Furthermore, we do not see any evidence of knowledge on Kates' part that his activities furthered a conspiracy to defraud the Government."

See:also United States v. Klein, 515 F.2d 751 (3d Cir. 1975).

In Call v. United States, 265 F.2d 167 (4th Cir. 1959), the Court reversed a conviction for conspiring to conceal the identity of purchasers of sugar through the filing of false reports. Although there was abundant evidence upon which a jury might have found defendant guilty of illegal activity, the Court concluded that the verdict that he had known that the sale of sugar would be concealed through the filing of a false report rested only upon speculation.

Similarly, in this case, the evidence as to Nemes was insufficient to establish her intent to defraud the government. As in the cases cited above, the only way the trial jury could have found specific intent to defraud the government on appellant's part was by piling one impermissible inference on top of another.

POINT IV

THE COURT ERRED IN FAILING TO CHARGE THE JURY THAT IT MUST FIND THAT APPELLANT POSSESSED THE SPECIFIC INTENT TO DEFRAUD THE GOVERNMENT

As indicated in the foregoing Point, the prosecution failed to prove that appellant had the specific intent to further the objects of the conspiracy.

To be a participant in a conspiracy to defraud the United States, it is essential that the member do so with specific intent to defraud the government. Despite this requirement, Judge Wyatt failed to instruct the jury that it must find that appellant had that necessary degree of criminal intent. This failure, which was timely brought to the Court's attention constituted prejudicial error.

In instructing the jury on the degree of intent required to establish appellant's membership in the conspiracy, the Court said:

> "If you do conclude that a conspiracy as charged did exist, then you must next determine whether the defendant on trial, Mrs. Clara Nemes, was a member, that is, whether she knowingly and wilfully associated herself with the conspiracy. And in making this determination you should, of course, consider all the evidence in the case.
>
> Now, you heard the words 'wilfully and knowingly.' 'Knowingly,' of course, means to do an act voluntarily and in-

> tentionally and not because of mistake or accident or some other such innocent reason. 'Wilfully' means to act knowingly, deliberately and with a bad purpose and motive, but it is not necessary that the defendant know that she is breaking any particular law." (A.112-113; R.1674-1675).

Judge Wyatt merely told the jury that appellant need only possess general intent and failed to point out that Nemes had to possess specific intent to defraud the United States in the application of the Medicare and Medicaid laws. Timely objection was made to the Court's instruction (R.1685-1686). While Judge Wyatt's charge was perfectly proper in a case where only general criminal intent is a requisite for conviction, it was woefully inadequate where specific intent was an essential element of the offense.

The Supreme Court has recently held that "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the government must prove at least a degree of criminal intent necessary for the substantive offense itself." United States v. Feola, 420 U.S. 671, 686 (1975). Thus, where specific intent to defraud the government is an element of a substantive offense, it is also an essential element in a charge of conspiracy to violate that substantive statute. United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975); United States v. Cangiano, 491 F.2d 906 (2d Cir.), cert. denied, 419 U.S. 904 (1974).

In the instant case, Nemes was charged with being part of a conspiracy to violate 18 U.S.C. §1001 and 18 U.S.C. §287.

Both of these statutes proscribe the submission of fraudulent statements to the United States. The mens rea requirement for both offenses is specific intent to defraud the government. United States v. Kates, supra; United States v. Lange, 528 F.2d 1280 (5th Cir. 1976); United States v. Snider, 502 F.2d 645 (4th Cir. 1974); United States v. Markee, 425 F.2d 1043 (9th Cir.), cert. denied, 400 U.S. 847 (1970). Accordingly, the failure to explicitly instruct the jury that in order to be convicted of the conspiracy charged appellant must have had the specific intent to defraud the government,constitutes reversible error. United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970); United States v. Gillilan, 288 F.2d 796 (2d Cir. 1961); United States v. DeMarco, 488 F.2d 828 (2d Cir. 1973).

Judge Wyatt's failure to so instruct the jury was severely prejudicial to Nemes. The crucial issue at trial was intent and knowledge. That is, was Nemes a mere bookkeeper as the defense asserted, or a knowing participant in a scheme to defraud the United States as the prosecution argued? Thus the failure to properly charge the jury on the degree of scienter required went to the very heart of the case. Moreover, Judge Wyatt's failure to charge on specific intent is surprising. Not only did defense counsel make a timely objection and request for such an instruction but the government also requested that the Court instruct the jury that appellant must have had "specific intent" (A.88-89)

In the absence of such a charge, which both sides requested, it was impossible for the jury to make an intelligent evaluation of defendant's guilt or innocence, and its verdict cannot stand.

POINT V

THE GOVERNMENT'S SUMMATION--
INCORPORATING INFLAMMATORY STATEMENTS
CONTRARY TO THE EVIDENCE AND INCLUDING
IMPROPERLY UNFAIR SUGGESTIONS AND
INSINUATIONS--WAS SUFFICIENTLY PREJUDICIAL
TO REQUIRE REVERSAL.

This Circuit, in addressing itself to the issues of prosecutorial misconduct and inflammatory summations, has consistently warned that such mischief may constitute sufficient cause for reversal. United States v. Bivona, 487 F.2d 443 (2d Cir. 1973); United States v. White, 486 F.2d 204 (2d Cir. 1973); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). As the Supreme Court has declared, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). That standard was not adhered to here. The following five instances are indicative of the prejudicial unfairness of the government's summation.

1. In his closing argument the prosecutor urged that appellant had forged Olga Vera's signature to Limpio checks (A.55-56; R.1572-1573). Not only was there no evidence to support that assertion; it was flatly contradicted by the government's own handwriting expert who specifically testified that he had compared exemplars of appellant's handwriting with the questioned documents and was "not able to tie her into any of these" (R.1516).

2. In effect, the prosecutor testified during his summation. Not content with the receipt into evidence of improper

hearsay relating to Olga Vera's purported testimony before a state grand jury, the prosecutor embellished upon such hearsay and told the jury his version of that testimony:

> "A woman who has a poor memory, as testifed to by her daughter. And all of a sudden she is brainwashed and goes back and spews this forth to the grand jury:
>
> 'Oh yes, it is my company and Clara Nemes and I are going to go out and make money and this and that and other things,' and the answers are supplied by Mrs. Nemes."(A.67; R.1584). (Emphasis added).

That purported testimony appears nowhere in the transcript. Moreover, the quoted comments served to focus the jury's attention on an alleged attempt to cover up a separate offense that was not charged in the indictment.

3. In his opening statement the prosecutor promised to prove that "the person that really ran Limpio Cleaning Services was Clara Nemes" and "Clara Nemes really controlled Limpio"(R.45). The government's proof, however, never substantiated that claim. Instead the evidence established that Severino and Karlin ran Limpio (using Olga as a figurehead) and every prosecution witness testified that appellant exercised absolutely no control over Limpio and was nothing more than a bookkeeper. Even if the prosecutor did not know what his witnesses' testimony was going to be when he opened to the jury (which we doubt), he certainly knew what the proof was by the end of the trial. Nevertheless, in the

face of this clearly contrary proof and without any evidentiary basis, the prosecutor urged in summation that insofar as appellant was concerned "the strongest evidence is Limpio Services" and that "the evidence shows that Limpio Services. . . was a corporation utterly controlled by Manlio Severino and Clara Nemes (A.46; R.1563), and even repeated this fallacious argument in his rebuttal summation (A.84; R.1649). Thus, the prosecutor urged the jury to draw an unfair inference based on unproven allegations.

4. As we have noted earlier in Point II, supra, error was committed in the receipt of evidence relating to Tarpetto cleaners. This improperly received evidence was used unfairly in summation. Hence the prosecutor repeatedly argued that appellant was involved in the "laundering of money " (A.34,53 ,62;R.1550,1571,1579). Since the prosecutor himself had flatly conceded that the Tarpetto evidence was not tied to the cost reports (A.62; R.1579), the use of these loaded words was indeed inflammatory and prejudicial. This Court has in the past warned against the use of arguments more proper for Perry Mason than in a federal courtroom. United States v. White, supra.

5. On a number of occasions, the prosecutor referred obliquely to appellant's failure to testify or to explain away the government's proof. In referring to excess cash remaining after Limpio's employees had been paid, the prosecutor stated, "there is no evidence of what Clara Nemes did with it" (A.51; R.1568). With reference to Karlin's testimony concerning appellant's repayment of money to Tarpetto, the prosecutor pointedly remarked, "there is no evidence of any jewelry being sold" (A.65; R.1582).

At another point the government's lawyer stated, "Mrs. Nemes testified before the grand jury in the latter part of February through Olga Vera, told her the story" (A.67; R.1584). In urging that appellant was more than a mere employee the prosecutor stated, "There is no evidence as to what Clara Nemes' exact arrangement was with Severino and Karlin" and that "all we know is that she had a lot of money to spend" (A.84; R.1649). And in urging the jury to speculate that, contrary to the government's own proof, appellant was somehow a participant in the preparation of cost reports,the prosecutor slyly referred to her demeanor at counsel table, stating, "You may have noticed how expertly she tore into those work paper folders when Percy Karlin was on the stand" (A.64; R.1581). Each of these remarks emphasized to the jury that the explanation for these transactions could only be supplied by Nemes and she had not done so.

The type of prosecutorial misconduct involved in this case was recently condemned by this Court in United States v. Burse, 531 F.2d 1151, 1155 (2d Cir. 1976) in words applicable to the instant case:

> "Perhaps if the case against Burse had been stronger, these improper comments would be of less significance. However, in an admittedly close case such as this, prosecutorial misstatements take on greater importance, whether those statements are intentional or not. The observations of the Supreme Court in the Berger case, supra, seem particularly appropriate here:
>
> 'The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted

only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak - depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.'

'In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.' Berger, supra at 88-89.

If one replaces the name of defendant Berger with defendant-appellant Burse [Nemes] and the name of government witness Katz with government witness DeBose [Karlin], this passage is a perfect description of the facts in the instant case. It should go without saying that successful - even zealous - prosecution does not require improper suggestions, insinuations and, especially, assertions of personal knowledge. Berger, supra, at 88. However, that is a lesson which was ignored below.

On the facts of this case, reversal is required."

On the facts of this case, a similar result is also required.

CONCLUSION

Each of the Points raised herein, standing alone, would be sufficient to justify reversal of the conviction appealed from. The cumulative effect of these errors is so devastating that a new trial is mandated. Accordingly, the judgment of conviction should be reversed and the case remanded for a new trial.

Dated: New York, New York
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Respectfully submitted,

ORANS, ELSEN & POLSTEIN
Attorneys for Appellant
One Rockefeller Plaza
New York, New York 10020

Of Counsel:

Robert Polstein
Gary P. Naftalis
Harold B. Tevelowitz